



January 30, 2003

Energy Facilities Siting Board
One South Station
Boston, Massachusetts 02110

RE: Promulgation of Rules Governing Siting of Natural Gas Pipelines and Participation in Federal Siting Proceedings, and Repeal of Certain Existing Siting Board Rules; Docket No. EFSB 02-RM-2

Ladies and Gentlemen:

On December 20, 2002, the Energy Facilities Siting Board (Siting Board) issued its Final Order Opening Rulemaking (Rulemaking) in the referenced docket. In that Rulemaking, the Siting Board proposes to create new regulations requiring Siting Board review and approval of natural gas pipeline projects constructed in Massachusetts -- including projects of interstate pipelines subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC or the Commission). Granite State Gas Transmission, Inc. (Granite State) offers the following comments in opposition to the Rulemaking.¹

Granite State is a wholly owned subsidiary of Nisource, Inc., and is an interstate pipeline subject to the jurisdiction of the Federal Energy Regulatory Commission. Granite State operates interstate pipeline facilities within Maine, New Hampshire and Massachusetts. Under the Siting Board's existing regulations, Granite State's pipeline facilities are exempt from significant state review. However, the new rules proposed in this Rulemaking could make certain of Granite State's future construction activities subject to the Siting Board's review.

Granite State is concerned with the direction taken by the proposed Rulemaking because it deviates from established practice with no cause and violates the preemption doctrine. Granite State supports the retention of the existing rules.

Rulemaking deviates from established practice with no cause.

The existing regulations have worked effectively in conjunction with FERC's regulations. Indeed the Rulemaking does not include any indication that the environment has not been adequately protected or that the Siting Board has been dissatisfied with the nature of interstate pipeline construction in Massachusetts. As the Siting Board notes, FERC's regulations require interstate pipelines to submit detailed support for prior notice and section 7(c) filings. Moreover, it is critical to remember that even when construction takes place pursuant to a pipeline's blanket certificate, the pipeline is not freed from regulatory oversight. It must still

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As required by the Rulemaking, these comments have also been submitted in electronic format by electronic mail to SitingBoard.Filing@state.ma.us (copy to Peter.Ray@state.ma.us)

comply with FERC's statutes and regulations. It must still comply with all environmental requirements. Landowners must be notified in advance and all necessary permits and clearances must be acquired before construction can begin. The Siting Board's Rulemaking presents no evidence that those methods of protecting the public have been insufficient. Rather, it appears the Siting Board is attempting to fill a regulatory void where none exists.

Rulemaking is precluded by federal preemption.

The Rulemaking presents no evidence that there is a regulatory gap that must be closed by the exercise of state oversight. At most, the Rulemaking states that:

The potential exists for significant regulatory disparity between construction proposed by interstate pipeline companies and construction proposed by Massachusetts' utilities and other developers. This disparity could result in differing degrees of environmental protection for intrastate and interstate projects; it almost certainly will result in differing degrees of public participation in the review of such projects.

Rulemaking at 12 (emphasis added).

The Siting Board's concerns arise from a mixing of apples and oranges. Interstate pipelines and intrastate pipelines are different classes of pipelines, subject to different types and degrees of regulation by federal regulatory agencies in the first instance and state regulatory bodies in the second. That division of responsibility is a long standing and well understood principle of regulatory law and the fact that it may lead to differing degrees of participation or protections does not mean there is anything lacking in the participation or protections afforded by the entities having jurisdiction over those two classes of pipelines.

In fact, the Siting Board's rule will create the very disparate treatment it is seeking to avoid: interstate pipelines owning facilities in Massachusetts will find themselves subject to disparate regulation for the same pipeline project just by virtue of having crossed state lines. This disjointed and multi-jurisdictional approach to regulation of interstate pipelines has been uniformly rejected by the courts and is one premise behind the preemption doctrine.

The intentional creation of a single regulatory framework under a single federal agency to govern the construction and operation of the nation's interstate natural gas infrastructure was among the goals behind passage of the Natural Gas Act. This was clear to the United States Supreme Court in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988) when it held that FERC has exclusive jurisdiction over the rates and facilities of interstate pipelines. *Schneidewind*, 485 U.S. at 307, 108 S. Ct. at 1154 (Michigan law regulating rates and facilities of interstate natural gas companies is preempted). The U.S. Court of Appeals for the Second Circuit followed suit in *National Fuel Gas Corp. v. Public Service Commission of NY*, 894 F.2d 571 (2nd Cir. 1990), when it rejected New York's attempt to regulate the siting and environmental aspects of proposed FERC jurisdictional interstate pipeline facilities. The

holdings of those decisions apply to all interstate natural gas facilities regardless of whether they are categorized as mainline pipelines, direct sales laterals, compressor stations or any of the other facilities that comprise these systems. To impose individual state reviews would fracture Congress' goal of a unified regulatory system and ultimately create a myriad of separate siting and environmental review frameworks, each with its own interests and constituencies. With no obligation for one state to cooperate with another regarding interstate natural gas facilities and states (at least as is implied by the instant rulemaking) ignoring the preemptive regulatory reach of FERC, interstate pipeline companies would be faced with the need to create mini-systems within each state's borders—with no guarantee that the mini-system in one state would be permitted to connect to the same company's mini-system in the adjacent state. More importantly, preemption prevents the possibility that a state action may prohibit or even limit a construction project approved by FERC. "[T]he disagreement between state and federal authorities over the wisdom of the project . . . would interfere with the federal regulatory scheme." *Schneidewind*, 485 U.S. at 310, 108 S. Ct. at 1155. Not only is that not what Congress intended, it is an unwise and imprudent approach to the dependable delivery of critical energy supplies to the nation's energy consumers.

For these reasons, Granite State respectfully requests that the Rulemaking be rejected to the extent it seeks to grant to the Siting Board the ability to review or approve construction by interstate pipelines.

Respectfully submitted,

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